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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-244

In the Matter of the

Imprisonment of Larry Little,

Petitioner.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

Petitioner originally filed a Petition for Writ of Habeas Corpus in the Superior Court Division, General Court of Justice, Forsyth County, North Carolina, which was denied, after hearing, in an Order entered March 18, 1971, by the Honorable Charles T. Kivett, Judge Presiding (appended to petitioner's petition). Petitioner then filed a petition for Writ of Certiorari in the Court of Appeals of North Carolina, which was denied by Order of the Court in conference on May 12, 1971, (No. 71SC152PC). His petition for Writ of Certiorari was then filed in the Supreme Court of North Carolina which was also denied by Order of the Court in conference on June 10, 1971 (No. 67PC, Spring Term, 1971).

From the judgment below, petitioner has filed this petition for Writ of Certiorari to the Supreme Court of North Carolina in the Supreme Court of the United States.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS

I. WHETHER THE DEFENDANT IN A CRIMINAL CASE CAN BE HELD TO BE IN CONTEMPT OF COURT WHEN HE STATES TO THE COURT THAT HE IS A POLITICAL PRISONER, THAT THE COURT HAS PREJUDGED HIS CASE, AND THAT THE COURT IS BIASED?

II. WHETHER A JUDGE MAY RULE UPON CONTEMPT CHARGES COMMITTED BY A DEFENDANT IN A CRIMINAL CASE IN THE PRESENCE OF THE COURT, WHEN THE DEFENDANT STATES TO THE COURT THAT THE COURT IS BIASED AND HAS PREJUDGED HIS CASE?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV.

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA:

Section 5-1(1). *Contempt Enumerated; Common Law Repealed.*—Any person guilty of any of the following acts may be punished for contempt:

> 1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

Section 5-4. *Punishment.*—Punishment for contempt for matters set forth in the preceding sections shall be by fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretion of the court.

Section 5-5. *Summary Punishment for Direct Contempt.*—Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order.

Section 5-6. *Courts and Officers Empowered to Punish.*—Every justice of the peace, referee, commissioner, judge of a court, magistrate, or judge, justice, or clerk of the General Court of Justice, or member of the board of commissioners of each county, or member of the Utilities Commission or Industrial Commission, has the power to punish for contempt while sitting for the trial of causes or while engaged in official duties.

STATEMENT OF THE CASE

The petitioner, Larry Little, was brought to trial upon the charge of carrying a concealed weapon, N.C.G.S. §14-269, during March of 1971, in the District Court Division of the General Court of Justice for Forsyth County, North Carolina. By Order of March 8, 1971, the Honorable A. L. Sherk, Judge Presiding at petitioner's trial, found that during the course of the trial and immediately thereafter, the following events occurred:

1. That the defendant stated that the court was bias.

2. That he was a political prisoner.

3. That the court had pre-judged the case.

Judge Sherk "at this point informed the defendant that he was in contempt and the Court felt that these remarks were very disrespectful and tended to subvert and prevent justice." As the petitioner was being removed from the courtroom, he called the presiding judge a "M..... F....." "The Court conclude(d) on the foregoing facts that the conduct of the defendant and the words spoken by him in the presence of the court were contemptuous, that they reflected on the integrity of the Court and tended to subvert and prevent justice, and the defendant is thereabove held in contempt of this Court." The Court then ordered that the petitioner "be imprisoned in the common jail of Forsyth County for a term of thirty days."

Petitioner filed an Application for Writ of Habeas Corpus with the Clerk of the Superior Court Division of the General Court of Justice of Forsyth County, North Carolina, on March 16,

1971, seeking the release from his confinement. Writ of Habeas Corpus was issued, and the matter was heard in the Superior Court on March 18, 1971. By Order of Mar h 18, 1971, the Honorable Charles T. Kivett, Judge Presiding, determined that the petitioner was not being restrained of his liberties in violation of the Constitution or laws of the United States or of the State of North Carolina. Judge Kivett found that the defendant's utterances were made in open court during his trial and were in the presence and hearing of the District Court Judge, which were in direct contempt of court. The Court found that the District Court had jurisdiction of the defendant and the subject matter of the trial; that the District Court had the authority to punish the defendant for contempt of court and did not exceed said authority; that the conduct of the petitioner amounted to a direct contempt of court under N.C.G.S. §5-1(1) in that such words uttered in the presence, immediate view and hearing of the court and those assembled therein, directly tended to interrupt its proceedings and to impair the respect due the District Court's authority.

From the Judgment of the Superior Court Division, the petitioner filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals (No.71SC152PC), to review the Order below. By Order of the North Carolina Court of Appeals in Conference, dated May 12, 1971, the Petition for Writ of Certiorari was denied. Petitioner then filed a Petition for Writ of Certiorari in the Supreme Court of North Carolina (No. 67PC, Spring Term, 1971), which was denied by Order of the Court in Conference on June 10, 1971.

From the denial of Certiorari by the Supreme Court of North Carolina, petitioner has now filed the present Petition for Writ of Certiorari in the Supreme Court of the United States.

ARGUMENT

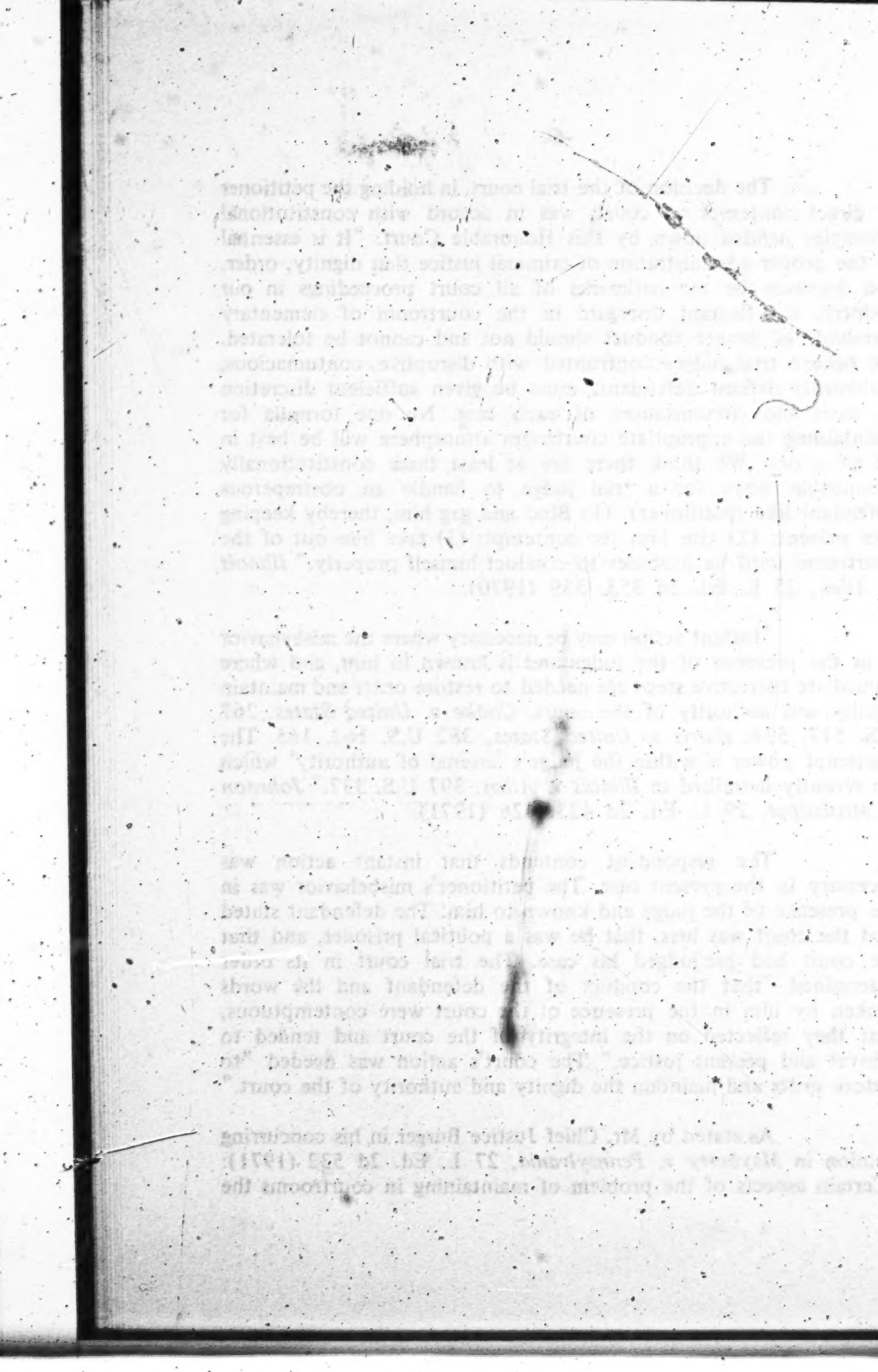
I. THE DEFENDANT IN A CRIMINAL CASE CAN BE HELD TO BE IN CONTEMPT OF COURT WHEN HE STATES TO THE COURT THAT HE IS A POLITICAL PRISONER, THAT THE COURT HAS PRE-JUDGED HIS CASE, AND THAT THE COURT IS BAISED.

The decision of the trial court, in holding the petitioner in direct contempt of court, was in accord with constitutional principles handed down by this Honorable Court. "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country, the flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally premissible ways for a trial judge to handle an obstreperous defendant like (petitioner): (1) Bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Illinois v. Allen*, 25 L. Ed. 2d 353, 359 (1970).

"Instant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain dignity and authority of the court. *Cooke v. United States*, 267 U.S. 517, 534; *Harris v. United States*, 382 U.S. 162, 165. The contempt power is within the judge's 'arsenal of authority' which we recently described in *Illinois v. Allen*, 397 U.S. 337." *Johnson v. Mississippi*, 29 L. Ed. 2d 423, 426 (1971).

The respondent contends that instant action was necessary in the present case. The petitioner's misbehavior was in the presence of the judge and known to him. The defendant stated that the court was bias, that he was a political prisoner, and that the court had pre-judged his case. The trial court in its order determined "that the conduct of the defendant and the words spoken by him in the presence of the court were contemptuous, that they reflected on the integrity of the court and tended to subvert and prevent justice." The court's action was needed "to restore order and maintain the dignity and authority of the court."

As stated by Mr. Chief Justice Burger in his concurring opinion in *Mayberry v. Pennsylvania*, 27 L. Ed. 2d 532 (1971): "Certain aspects of the problem of maintaining in courtrooms the



indispensable atmosphere of quiet orderliness are crucial. Without order and quiet, the adversary process must fail." 27 L. Ed. 2d, at 541. It takes little imagination to realize that when a defendant in a criminal proceeding states to the court that the court is biased, that he is a political prisoner, and that the court has pre-judged his case, that such disrupts the proceedings and requires immediate corrective steps. "(T)he contempt remedy should be borne in mind by a judge in the circumstances of this case." *Illinois v. Allen*, 25 L. Ed. 2d, at 360.

In his argument, petitioner contends that "the contempt powers are not to be invoked simply because one is not acting in his enlightened self-interest," that the petitioner's remarks were merely "tactless", and that "contempt is a remedy too drastic to be invoked merely for the enforcement of niceties of etiquette." (p. 12). The statements petitioner made to the trial judge reflect more than a mere lack of etiquette. Petitioner's intent to convey a hostile and distruptive attitude toward the court and proceedings before it can best be discerned from the statement he made to the court while being removed from the courtroom. "(O)ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity." *Illinois v. Allen*, 25 L. Ed. 2d, at 360.

"Summary contempt is for 'misbehavior' (*EX PARTE TERRY*, 128 U.S. 289, 314, 32 L. Ed. 405, 412, 9 S. Ct. 77) in the 'actual presence of the court.' Then speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.' *Cooke v. United States*, 267 U.S. 517, 534, 69 L. Ed. 767, 773, 45 S. Ct. 390." *Harris v. United States*, 15 L. Ed. 2d 240, 242 (1966).

The Courts of the State of North Carolina are provided by statute with the authority to punish summarily when the contempt is committed in the presence of the court. This Court has held that Federal Courts have power summarily to punish, under Rule 42(a), as a criminal contempt disobedience of its lawful order if the disobedience occurs in the presence of the court and is in the sight and hearing of the judge. *Yates v. United States*, 2 L. Ed. 2d 95 (1957); *Offutt v. United States*, 99 L. Ed. 11 (1954). As to the exercise of the Federal Courts' summary power to punish for contempt committed in the actual presence of the court, see

Annotations at 96 L. Ed. 762, 3 L. Ed. 2d 1855.

"(A) court . . . upon the commission of a contempt in open court might upon its own knowledge of the facts without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment, and to inflict such punishment as was fitting under the law." *Cooke v. United States*, 69 L. Ed. 767, 773 (1925).

The United States Supreme Court has held that criminal contempt proceedings do not fall within the meaning of the term "criminal prosecutions" as used in the Sixth Amendment, with the result that there is no Sixth Amendment right to a public trial in such contempt proceedings. *Levine v. United States*, 4 L. Ed. 2d 989 (1960). See also *Green v. United States*, 2 L. Ed. 2d 672 (1958). The power of the courts to punish contempt in the face of the court without further proof of facts and without aid of a jury is in accord with due process of law. *MacInnis v. United States*, 191 F. 2d 157 (1959), cert. den. 96 L. Ed. 708. See also Annotation, 93 L. Ed. 579, at 583.

Petitioner argues "in the present case there is no indication that petitioner would not have heeded a warning from the court that the argument was exceeding tolerable bounds," and therefore holding petitioner in contempt was not necessary to protect its proceedings. Any assertion that a warning would have been sufficient is dissipated by the petitioner calling the trial judge a "M..... F....." after being cited for contempt of court. Petitioner's contention that his statements to the court had no disruptive effect upon the proceedings tests one's common knowledge and understanding.

By his contemptuous statements, the petitioner was doing "more than exercising the right to be heard in his own defense." (Petition, p. 15). Petitioner alleges that he should have been allowed this latitude in presenting his case to the court, citing *Re McConnell*, 8 L. Ed. 2d 434 (1962), and *Holt v. Virginia*, 14 L. Ed. 2d 290 (1965). However, neither of the above cases present such a disrespectful and vindictive attack upon the court's authority as shown by the facts of the present case, and therefore would not

be authority for granting petitioner's request for relief.

Petitioner's conduct constituted a clear and present danger to the authority of the court and the orderly administration of justice, so that the judge, in punishing petitioner for contempt, was acting within constitutional bounds.

II. A JUDGE MAY RULE UPON CONTEMPT CHARGES COMMITTED BY A DEFENDANT IN A CRIMINAL CASE IN THE PRESENCE OF THE COURT, EVEN THOUGH THE DEFENDANT STATES TO THE COURT THAT THE COURT IS BIASED AND HAS PRE-JUDGED HIS CASE.

Petitioner contends that his attacks upon the integrity of the judge disqualified the trial judge from sitting in the contempt proceeding, and he should have been given a public trial before another judge, citing *Mayberry v. Pennsylvania*, 27 L. Ed. 2d 532 (1971). In *Mayberry*, this Court held that: "where (the trial judge) does not act the instant the contempt is committed but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place." 27 L. Ed. 2d, at 539.

In the present case, the trial judge did not wait until the end of the trial to hold the petitioner in contempt. "The court *at this point* informed the defendant that he was in contempt . . . ." (Order of March 8, 1971). "As these separate acts or outbursts took place, the arsenal of authority described in *Allen* was available to the trial judge to keep order in the courtroom. He could, with propriety, have instantly acted, holding petitioner in contempt." 27 L. Ed. 2d, at 539.

"It is of course not every attack on a judge that disqualifies him from sitting." 27 L. Ed. 2d, at 540. See also *Ungar v. Sarafite*, 11 L. Ed. 2d 921 (1964). There is no evidence that the trial judge became so "personally embroiled" with the petitioner "as to make the judge unfit to sit in judgment on the contempt charge." 27 L. Ed. 2d, at 540.

"Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case." 27 L. Ed. 2d, at 539.

The attacks upon the judge in *Mayberry* were of a more severe nature that leave "personal stings" than the facts presented in the present case. (See 27 L. Ed. 2d, at 535-538). "Many of the words levelled at the judge in (*Mayberry*) were highly personal aspersions, even 'fighting words' – 'dirty sonofabitch,' 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool.' He was charged with running a Spanish Inquisition and told to 'Go to hell' and 'Keep your mouth shut.' Insults of that kind are apt to strike 'at the most vulnerable and human qualities of a judge's temperament.'" 27 L. Ed. 2d, at 540. The vicious and prolonged attach by Mayberry upon the judge presiding presents a picture of marked contrast with the facts of the present case, where the petitioner stated that the court was biased and had pre-judged his case. There is no evidence that the presiding judge was not able "to maintain that calm detachment necessary for fair adjudication." 27 L. Ed. 2d, at 540.

CONCLUSION

The respondent respectfully requests that for the above reasons that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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